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In The
Supreme Court of the United States

October Term, 1983

No. 83 - 1847

RICHARD I, INC., d/b/a RICHARD I SCHOOL OF
BEAUTY CULTURE, EJRY, INC., d/b/a
RICHARD I BEAUTY SCHOOL, VIOLET CURRY
and DOLORES ECTOR,

Petitioners,

-against-

GORDON AMBACH, as Commissioner of Education of
the State of New York, and the Education Department
of the State of New York,

Respondents.

**PETITIONERS' REPLY TO BRIEF IN
OPPOSITION TO PETITION FOR CERTIORARI**

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Petitioners submit the following Brief in reply to the Brief of the Respondents which was submitted in opposition to the Petitioners' Petition for Certiorari.

JURISDICTION

The Petition contains a typographical error and jurisdiction of this Court is conferred under 28 U.S.C. §1257 subsection (3) rather than subsection (2).

POINT I**THE PETITION PRESENTS SUBSTANTIAL
AND CONCRETE ISSUES**

At the outset, Petitioners wish to correct the assertion by Respondents that the instant Petition for Certiorari is academic insofar as it pertains to licensure of Petitioners' schools and their right to operate. In this case important privacy rights were mandated by the State to be invaded by a covert and speculative data gathering process, and as a result of Petitioners' refusal on grounds of moral conviction to engage in this process a severe and unconstitutional sanction was visited upon them.

It is true, as Respondents note, that the requirement for submission of the challenged portions of the OEDS forms was dropped by Respondents and that subsequent to the license year in issue, Petitioners' schools were issued licenses to operate. However, the subsequent issuance of licenses by no means cures the impact of the wrongful failure to renew the licenses in 1980, since Petitioners now may be deemed to have been operating unlicensed institutions with concomitant reputational harm and possible harm to students whose financial and license circumstances are subject to change depending on their having attended a licensed institution. Such liberty and property interests, cf. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, are obviously substantial and directly affected by the granting or denial of the instant Petition. Moreover, though the Petitioners' motivation to pursue this Petition certainly involves a matter of principle, the practical impact of the decision below is an extremely important factor in the Petitioner's application for the Writ of Certiorari.

POINT II**PETITIONERS WERE CONSTITUTIONALLY
ENTITLED TO A HEARING**

Although Petitioners' schools lost their licenses as a result of a refusal to renew them, rather than by a revocation, this in context is a distinction without a difference. Petitioners wish to correct the impression sought to be conveyed, in Respondents' Statement of the Case, that the OEDS forms were part of the statistical information required in the license application process. The OEDS forms were never part of the license application, and there is nothing in the record below to indicate that the OEDS forms were such a part of that license application process.*

The relevance of this point is that Petitioners' schools were not denied renewal licenses as a result of a technical omission in the license application. Instead, as noted in the Petition, the failure to renew was a punitive sanction sought to be invoked by Respondents as a result of Petitioners' failure to accede to what they believed was an unreasonable, illegal, and unconstitutional demand for information. Thus, in context, the failure to renew the licenses was a *de facto* revocation which raised a due process requirement of a hearing. *Duplex Co. v. Deering*, 254 U.S. 443, 465; *Truax v. Corrigan*, 257 U.S. 312.

Moreover, Respondents' contention in Point IV of its Brief in Opposition, that the failure to renew Petitioners' license posed no due process implications,

* It also is untrue, contrary to the assertion on page 16 of the Respondents' Brief, that Petitioners ever have admitted they failed to comply with any licensing requirement. Petitioners have made no such admission.

is but another example of the form over substance due process analysis soundly rejected in *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 571 *supra*. As noted in *Roth*, it is the nature of the interest affected which is critical on a due process analysis, and here the interest was the very right of the schools to operate.

It was for this reason that Petitioners so adamantly requested a hearing. The Petitioner schools found themselves unable to comply with the departmental directive regarding OEDS, and this fact clearly was susceptible of being established at a hearing. Contrary to the Respondents' argument, Petitioners' ability, as distinguished from their duty, to comply with the OEDS directive presented a critical issue of fact and not one of law.

POINT III

RESPONDENTS CANNOT CURE THE PRIVACY VIOLATIONS INHERENT IN THE OEDS SYSTEM MERELY BECAUSE SYSTEM DATA ON PERSONAL CHARACTERISTICS OF PARTICULAR STUDENTS WAS NOT MAINTAINED

In Point II of Respondents' Brief in Opposition to the Petition, Respondents claim that there was no denial of privacy rights merely because no individualized data was maintained for students regarding the personal characteristics that must be reported under the OEDS. This argument totally ignores Petitioners' objection to the process of gathering the data itself and that in that process individualized characteristics of particular students had, of necessity, to be identified.

In this regard it is noteworthy that Respondents say there is a "conspicuous" failure by Petitioners to mention that the statistical information was not used to personally identify any of the students in

Petitioners' schools. However, Respondents' counsel obviously failed to read page 9 of the Petition where Petitioners stated that the data was maintained for the student body as a whole and that Respondents had used this as an argument that the personal privacy rights of the students were not at issue. Thus, this matter was directly addressed at page 9 of the Petition, and moreover the discussion at that point indicates that Respondents' contention that the privacy rights of Petitioners' students were not violated is unpersuasive.

It is the data gathering process under which Petitioners' schools were required to intrude and make speculative categorization decisions regarding particular students that results in the Petitioners' objections. Petitioners' students object to having such covert decisions made concerning them, and the Petitioner schools object to being forced to engage in the categorization process. From the very beginning of this legal controversy, Petitioners have steadfastly advocated that such a procedure violates fundamental constitutional privacy interests and constitutes an unjustified government intrusion into the private educational system. At no point have Petitioners retreated from these arguments.

Respondents' contention in Point IV of the Brief in Opposition to the Petition that Petitioners fail to assert a constitutional basis for their argument that they had a right not to be involved in the speculative covert governmental data gathering process regarding the personal lives of their students, is totally without foundation. While it may be true that Respondents' constitutional arguments in this regard are in part derivative of a conclusion that the Petitioners' students' rights would be violated by OEDS, it is clear from Petitioners' Brief in the Court below that they were "unwilling to pry into the personal lives and privacy of their students" and that Petitioners were not "willing

to require school staff to engage in the kind of speculation and invasion of student's privacy rights required to complete the forms." *Olmstead v. United States*, 277 U.S. 438, was cited below as authority for the proposition that Petitioners' privacy rights were unconstitutionally invaded. Petitioner schools, in relying on *Pierce v. Society of Sisters*, 268 U.S. 510, also asserted the argument in their own right that the imposition of such duties on Petitioners overstepped government authority over private education.

It is true that State law arguments were made, indeed emphasized, in the Courts below in opposition to the OEDS, primarily based on the contention that such a system could not properly be implemented without resort to the procedures set forth in the State Administrative Procedure Act. However, it would have been jurisdictionally fatal for Petitioners not to have done so, as this Court has required that State courts be given an opportunity to construe State law in a manner that obviates the constitutional objections. *Webb v. Webb*, 451 U.S. 493, 500-501. In any event, even if it is assumed for purposes of argument that such federal basis for relief had not been clearly articulated, this Court has not applied a rule that federal issues that need be identified with "inflexible specificity", and, moreover, this Court retains jurisdiction to review plain error when necessary to prevent fundamental unfairness. *Vachon v. New Hampshire*, 414 U.S. 481, 480.

Respondents' argument that Petitioners have no standing to assert the privacy rights of their students totally ignores *Runyon v. McCrary*, 427 U.S. 160. Likewise unavailing is Respondents' argument that 34 CFR §106(c), insofar as it allows review of certain statistical data, somehow insulates the OEDS from any infirmity as a result of invasion of the privacy rights of Petitioners' students. Aside from the fact

that no such regulation could supersede Petitioners' constitutional rights, the fact remains that Petitioners' objections pertain to the data gathering process and the method by which Petitioners' schools are required to participate in the data gathering process. Respondents' argument, in essence, is that the data gained from covert and speculative observations of individual students may be sterilized simply by maintaining the wrongfully gathered data in a form which does not identify individual students. However, this hardly cures the invasion of privacy needed to obtain the data in the first place.

Likewise unavailing should be Respondents' objection that this court should not grant the instant Petition because an alternate State law ground for the decision below supposedly obviated the necessity for reaching Petitioners' constitutional arguments. See e.g. *Lynch v. New York ex rel Pierson*, 293 U.S. 52. The fact that a State law basis for a decision was relied upon by the court below cannot by any stretch of logic obviate the consideration of the constitutional issues if the argument of the Petitioners is that the application of the State law is itself the challenged constitutional infirmity. The ~~Lynch~~ rule applies only where the State court rationale is a truly independent and constitutionally unchallenged basis for the decision below.

Respondents also argue that Petitioners failed to preserve their argument now presented in sections B and C of the Petition, that Petitioners' due process rights were violated by the failure to afford Petitioner an opportunity or forum in which to challenge the rationality and intrusiveness of OEDS. However, the due process arguments clearly were made in Point I in Petitioners' Brief in the court below, where Petitioners relied by analogy on *John Doe d/b/a Capri Art Theater v. City of Buffalo*, 56 N.Y.2d 926. That

case held that a vague authorization to obtain "such other information as [the Administrator] shall require" was a constitutionally insufficient authorization in an area affecting First Amendment rights. As Petitioner argued below, where "open-ended discretionary power to collect information" and "fundamental privacy interests are involved," the rule should be no different than under constitutional analysis in the First Amendment area.

CONCLUSION

A Writ of Certiorari should be issued to review the opinion and judgment of the New York State Court of Appeals.

Respectfully submitted,

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